Supreme Court, U.S.
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No. 99-

In the
Supreme Court of the United States
October Term, 1998

In the Matter of Louis Kerlinsky
Petitioner

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

Petition for Writ of Certiorari

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42pp

Questions Presented

A. Will the United States Supreme Court keep its promise, "this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever," *Sacher v. U.S.*, 343 U.S. 1,13 (1952), and prevent the chilling of access to the courts and justice, *Zaudere v. Office of Disciplinary Counsel*, 471 U.S. 626, 643, 669 (1985),where the Massachusetts Supreme Judicial Court (S.J.C.) has suspended petitioner's license to practice law arbitrarily and in violation of the Fourteenth Amendment of the Constitution of the United States because of his so representation of a client in a product safety suit against General Motors?

I. Did the S.J.C. violate petitioner's due process rights by punishing him on the basis of new, unprecedented, ex post facto, irrational interpretations of vague disciplinary rules, which it applied retroactively to him without "fair warning," in a decision that conflicts with such cases as *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049 (1991), *Zauderer*, supra, 664-669, *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), *Kaiser Alum. v. Bonjorno*, 494 U.S. 827, 855 (1990), *Schad v. Arizona*, 501 U.S. 625, 637 (1991)?

I.a. Was the due process clause violated when the S.J.C., on the basis of such interpretations, punished petitioner for violating:

1) DR 7-101(A), ("A lawyer shall not intentionally...damage his client,") where it held such intention was "irrelevant" and where no such intent was found?

2) DR 7-102(A)(2), (knowingly "advance a claim that was unwarranted under existing law,") because the evidence of damages was "contradictory"?

3) DR 6-101(A)(3), "neglect," to search for evidence of the cause of his client's car fire and injuries even though

it was found (erroneously) that "the facts did not support the claim to begin with regardless of prompt and adequate preparation"?

4. DR 7-102(B)(1), (client clearly "perpetrated a fraud" and "he failed to reveal it,") even though it was found that no fraud was "perpetrated" and no "revealing" was needed as "the defendants did not believe the information and did not rely on it"?

5. DR 7-102(A)(7), (assisted "his client in conduct that he knew to be....fraudulent,") where there was no finding of client fraud; the hearing committee (h.c.), the sole trier of fact, found that the petitioner did not "engage in conduct involving dishonesty, fraud"; the Mass. Bar Association opined that, because of vagueness and lack of precedent; "no lawyer should be disciplined under this rule" regarding a client's perjury; no authority had interpreted "assist"; and the S.J.C. found petitioner "knew" of his client's "fraud" only because it ruled, contrary to all precedent, that he should have judged her credibility and state of mind?

II. Did the S.J.C. violate petitioner's due process right to a hearing by reversing the finding of fact that he did not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" made by the sole trier of fact, where there was no evidence of such conduct and where the S.J.C. heard no evidence, and relied on an appeal panel that heard no evidence to reach its conclusion, contrary to the rulings in *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

III. Did the S.J.C. deny due process by ruling that its Rule 4:01, which "allows an attorney to be punished on proof by a preponderance of the evidence as opposed to 'clear and convincing evidence,'" is not "unconstitutional", where this conflicts with rulings in *Santosky v. Kramer*, 455 U.S. 745 (1982), and *Netterville v. Miss. State Bar*, 397 So. 2nd 878 (Miss., 1981), which require proof by "clear and convincing evidence" to discipline a lawyer, as

do forty (40) States and the Federal Courts, and where this question was left open in *Steadman v. S.E.C.*, 450 U.S. 91, 97, n. 15, 104 (1981)?

IV. Does S.J.C. Rule 4:01 violate the Equal Protection clause of the Fourteenth Amendment by discriminating against lawyers by disciplining them under a "preponderance of the evidence" standard of proof when its Rule 10 on Judicial Conduct permits disciplining of judges only on "clear and convincing evidence?"

V. Did the S.J.C. violate due process by ordering punishment for "fraudulently procured affidavits" when there was no evidence thereof and petitioner was not charged therewith, thus conflicting with *In re Ruffalo*, 390 U.S. 544, 555 (1968)?

VI. Did the S.J.C. violate due process by enhancing petitioner's punishment because he "lacks any appreciation that his behavior was improper and violated the Canons of Ethics" where the petitioner exercised the Constitutional right to access to the courts on behalf of his client, thus conflicting with *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) and *U.S. v. Dunnigan*, 507 U.S. 87, 93, 94 (1993)?

VII. Where this is not an isolated case of a violation of the U.S. Constitution by the Massachusetts Supreme Judicial Court, the press has published articles stating that there is "something locally amiss" with the S.J.C., and the threat of arbitrary punishment of attorneys profoundly affects all lawyers, unlike threats to lawyer advertising, should this petition be granted?

LISTING OF PARTIES

B. All parties are Louis Kerlinsky, petitioner and Board of Bar Overseers and Bar Counsel, 75 Federal Street, Boston, MA 02110.

TABLE OF CONTENTS

	Page
Questions Presented	1
List of parties	iv
Table of Contents	iv
Table of Authorities	vii
Citations of reports of opinions and orders	1
Basis for jurisdiction	1
Constitutional provision, 14th Amendment	1
Statement of the case	1
Statement of facts	3
Reasons for allowance of the writ	16

A. Protection of lawyers from violations of their Fourteenth Amendment rights is required for the administration of justice and access to the courts 16

I. Instruction by the United States Supreme Court that due process prohibits punishment on the basis of new, unprecedented, ex post facto, irrational interpretations of vague rules applied retroactively without "fair warning" is needed where decisions of the highest court of a State afflicting such punishment conflict with decisions of the United States Supreme Court including *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049 (1991), *Schad v. Arizona*, 501 U.S. 625, 637 (1991) 18

I.a. The Due Process clause was violated when the petitioner was punished by the S.J.C. for violating:

1. DR 7-101(A) ("A lawyer shall not intentionally....damage his client") where it held such intention was "irrelevant" and where no such intent was found 18

2. DR 7-102(A)(2) ("knowingly advance a claim that was unwarranted") where it held that a claim was unwarranted because it was based on evidence that was contradicted.....19

3. DR 6-101(A)(3) ("neglect") where it erroneously found negligence in searching for non-existent evidence.....20

4. DR 7-102(B)(1) (failing to "reveal" a client's "perpetrated fraud") where there was no fraud "perpetrated" and no "revealing" was needed.....20

5. DR 7-102(A)(1) (assisting "his client in conduct he knew to be fraudulent") where there was no client fraud found, and, without precedent, "knowing" was defined as what a lawyer should understand after judging his client's credibility, and "assisting" was defined as failing to "correct" and filing a client's statements.....20

II. The S.J.C. violated due process rights to a hearing when it reversed the finding of the sole trier of facts, that petitioner had not "engaged in conduct involving dishonesty, fraud, deceit or misrepresentation", where the S.J.C. heard no evidence, relied on an appeal panel that heard no evidence, and there was no such evidence. Its decision conflicts with U.S. Supreme Court decisions including *Goldberg v. Kelly*, 397 U.S. 254, 269, 271 (1970).....22

III. S.J.C. Rule 4:01 denies due process by allowing "an attorney to be punished on proof by a 'fair preponderance of the evidence' as opposed to 'clear and convincing evidence,'" thereby conflicting with *Santosky v. Kramer*, 455 U.S. 759 (1982), and *Netterville v. Miss. State Bar*, 397 So.2d 878 (Miss., 1981).....23

IV. S.J.C. Rule 4:01 denies equal protection by discriminating against lawyers by allowing disciplining of them on proof by a 'preponderance of the evidence' while its Rule 10 on

Judicial Conduct allows disciplining of judges only on proof by "clear and convincing evidence." 24

V. The S.J.C. violated due process by punishing petitioner for "fraudulently procured affidavits" when there was no evidence thereof and petitioner was not charged therewith, thus conflicting with *In re Ruffalo*, 390 U.S. 544, 555 (1968) 24

VI. The S.J.C. violated due process by enhancing petitioner's punishment because he "lacks any appreciation that his behavior was improper." thereby conflicting with *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) and *U.S. v. Dunnigan*, 507 U.S. 87, 93, 94 (1993) 25

VII. This is not an isolated case of the S.J.C. violating the U.S. Constitution and the threat of arbitrary punishment adversely affects the practice of law 26

CONCLUSION 29

Index to Appendices

		Appendix Page
Appendix A	Decision of Mass. Supreme Judicial Court, *In the Matter of Louis Kerlinsky*, 428 Mass. 656, 704 N.E.2d 903 (1999)	1
	and Order	14
Appendix B	Memorandum of Decision by Single Justice	15
	and Decision of Appeal Panel, *In re Louis Kerlinsky*, 13 Mass. Attorney Discipline Reports 363 (1997)	15
Appendix C	Report of Hearing Committee (1995)	38
	and Supplement (1996), unreported	88
Appendix D	Order denying rehearing (February 22, 1999)	91
Appendix E	Petition for Discipline (1994)	92
Appendix F	Petition for Rehearing (1999)	101

TABLE OF AUTHORITIES

Cases	Page
Addington v. Texas 441 U.S. 418 (1979)	12
Bombardi v. Pochel Appliance & T.V. Co. 515 P.2d, 540 (Wash., 1973)	6
Bouie v. Columbia 378 U.S. 347, 353, 354 (1963)	10
Bowman Transportation v. Ark. Best Freight System, Inc. 419 U.S. 281, 288, n.4 (1974)	24
Brow v. Stanton 12 Mass. App. 992 (1985)	7
Cassisi v. Maytag Co. 396 So.2d 1140 (Fla., 1981)	6
Checkosky v. S.E.C. 23 F.2d 461, 485 (D.C. Cir., 1994)	26
Cole v. Arkansas 333 U.S. 196, 201 (1948)	22
Com. v. Sullivan 410 Mass. 521, 527 (1991)	21
Connally v. General Construction Co. 269 U.S. 385, 391 (1926)	19
Cornell Drilling Co. v. Ford Motor Co. 359 A.2 822 (Pa., 1978)	6
Cruzan v. Dir. of Miss. Dept of Health 497 U.S. 261, 300 (1990)	24
Eastern Enterprises v. Apfel 118 S.Ct. 2131, 2135 (1998)	19
Ex Parte Garland 4 Wall. 333, 377 (1866)	10
Ex Parte Wall 107 U.S. 265, 2 S.Ct. 569 (1883)	10

Cases **Page**

Gentile v. State Bar of Nevada
501 U.S. 1048, 1049, 1051 (1991).....10,12,13,16,18,19

Goldberg v. Kelly
397 U.S. 254, 269, 271 (1970).....9,11,13,15,19,21

Grayned v. City of Rockford
408 U.S. 104, 108-109 (1972) 19

Greco v. Buccuoni
283 F.S. 978, 407 F.2d 87 (3rd Cir., 1969)..... 6

Griffin v. Ill.
351 U.S. 12, 17 (1956)..... 24

Guardianship of Roe
383 Mass. 405, 420, 421 N.E.2d 40, 45 (1981)..... 11

Haran v. Bd. of Registry of Medicine
398 Mass. 571, 500 N.E.2d 268 (1986)..... 11

Hurley v. Irish Amer. Gay Group of Boston
515 U.S. 557, 572 (1995)..... 27

In Matter of Fordham
423 Mass. 481 (1996)..... 26

In Matter of Lake
428 Mass. 440 (1998)..... 27

In Matter of Thalheim
853 F.2d 383 (5th Cir., 1984)..... 10

In Re Fisher
179 F2d 361, 369 (7th Cir., 1950)..... 11,23

Cases	Page
In Re Gault 387 U.S. 1, 33-34 (1967)	24
In Re Grievance Com. of U.S. Dist. Ct. of Conn. 847 F.2d 57, 62 (2nd Cir., 1988)	8,21
In Re Medrano 956 F.2d 101, 102 (5th Cir., 1992)	10,11,21
In Re Oliver 333 U.S. 257, 263 (1948)	24
In Re Primus 436 U.S. 433, 434, 436 (1978)	17
In Re Ruffalo 390 U.S. 544, 546, 552, 555 (1968)	9,10,12,14,16,24,25
In Re Ryder 263 F.S. 360, 361 affd. 381 F.2d 713 (4th Cir., 1967)	11
In Re Walton 676 P.2d 1078 (Ala., 1983)	10
Irish American Gay, Lesbian and Bi-Sexual Group of Boston v. Boston 418 Mass. 238 (1994)	27
Kaiser Alum. V. Bonjorno 494 U.S. 827, 855 (1990)	19
Kourouvacilis v. General Motors Corp. 410 Mass. 706, 708, 575 N.E.2d 734 (1991)	2,5

Cases	Page
Marks v. U.S. 430 U.S. 188, 191 (1977)	10
Marmer v. Bd. of Registration of Chiropractors 358 Mass. 18, 260 N.E. 2d 672, 675 (1970)	11
Matter of Jadd 391 Mass. 227, 461 N.E.2d 760, 761 (1984)	11
Matter of Kerlinsky 406 Mass. 67, 73, 546 N.E.2d 150, 153 (1989) cert. den., 498 U.S. 1067	26
Matter of Mayberry 295 Mass. 155, 167 (1936)	16
Netterville v. Miss. State Bar 397 So.2nd 878 (Miss., 1981)	11,23
North Carolina v. Pearce 395 U.S. 711, 717 (1969)	25
Powell v. Ala. 387 U.S. 45, 68-69 (1932)	15
Rinaldi v. Yeager 384 U.S. 305, 310 (1966)	24
Rivera v. Minnich 483 U.S. 574, 578 (1987)	11
Rockdale Managment Co. v. Shawmut Bank 418 Mass. 596, 598, 600, 638 N.E.2d 29, 32 (1994)	10

Cases — Page

Ryan v. Ryan
419 Mass. 86, 642 N.E.2d 1028, 1033 (1994)..... 10,16

Sacher v. U.S.
343 U.S. 1,13 (1982)..... 16,18

Salem v. M.C.A.D.
404 Mass. 170 (1989)..... 12

Santosky v. Kramer
455 U.S. 745 (1982).....9,10,11,12,13,16,23

Schad v. Arizona
501 U.S. 625, 627, 637, 640 (1991)..... 10,17

Shapiro v. Kentucky Bar Assoc.
486 U.S. 466, 489 (1988)..... 18

Slepin v. Beck
145 N.Y.S. 530 (1914)..... 26

Statewide Grievance Com. v. Presnick
575 A.2d 210, 215 (Conn., 1990)..... 11,24

Steadman v. S.E.C.
450 U.S. 91, 97 n.15, 104 (1981)..... 23

Supreme Court of N.H. v. Piper
470 U.S. 278 (1985)..... 11

U.S. v. Dunnigan
507 U.S. 87, 93, 194 (1993)..... 26

U.S. ex rel Wilcox v. Johnson
555 F.2d 115, 122 (2nd Cir., 1977)..... 21

Cases — Page

U.S. v. Goodwin
457 U.S. 368, 375 (1982)..... 10

U.S. v. Long
857 F.2d 436, 445, 447 (8th Cir., 1988).....12,21

Vitale v. Lecour
459 N.Y.S.2d 881 (1983)..... 26

Wisconsin v. Constantineau
400 U.S. 433, 437 (1971)..... 19

Wolff v. McDonnell
418 U.S. 539, 564, 566 (1974).....13,15,17,23

Zauderer v. Office of Disciplinary Counsel
471 U.S. 626, 643, 658, 664, 665-669, 667, n.10,
671-673 (1985).....17,19,20,22,25

Other: — Page

13 Mass. Attorney Discipline Reports, 359..... 1,4

A.B.A.-BNA Lawyer's Manual on Professional Conduct
§101:2112..... 10

A.B.A. Model Rules for Lawyer Disciplinary
Enforcement 18(C) (1989)..... 10

A.B.A. Informal Opinion #1273 (1973)..... 20

A.B.A. Informal Opinion #1416 (1979)..... 9

DR 1-102(A)(4)(5)(6)..... 21
DR 6-101(A)(3)..... 20

Other: Page

DR 7-101(A)(1)(2)(3)..... 8,12
DR 7-102(A)(2).....8,15,16,19
DR 7-102(A)(5)..... 12,25
DR 7-102(A)(7)..... 5,20
DR 7-102(B)(1)..... 5,8,20

Fourteenth Amendment of U.S. Constitution.....1,2,15,17

G.L. of Mass., c.93A, §9..... 4,7,20

Investigation of Motor Vehicle Fires, ¶80..... 6

Kirks's Fire Litigation Source Book..... 6,7
§7:03(1)

Mass. Com. on Judicial Conduct Rule 10..... 11,24

27 Mass. Law Weekly 1387, 1407 (March 1, 1999).... 28

Mass. Rules of Professional Conduct, §3.3.(1)..... 19

Opinion of M.B.A. Committee on Professional Ethics
#89-1..... 10,14,20

Restatement of Agency (2nd) §9, com. c..... 25

Restatement of Torts (2nd) §674, com. d..... 21

S.J.C. R.4:01 §8(3)..... 10,24

Wolfram, Modern Legal Ethics, (694)..... 21

Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the Mass. Supreme Judicial Court.

OPINIONS BELOW

The S.J.C.'s opinion and order appear at Appendix A (A.1) and is reported at 428 Mass. 656 (1999). The Board of Bar Overseers' opinion and Memorandum of Decision by Single Justice appear at Appendix B (A.15) and is reported at *13 Mass. Attorney Discipline Reports 363* (1997). The Hearing Committee Report (A.38) and Supplement (A.92) appear at Appendix C and are unpublished.

JURISDICTION

The date of the Order sought to be reviewed and on which the S.J.C. decided the case was January 14, 1999. A timely petition for rehearing, a copy of which appears at Appendix F, was denied by the S.J.C. on February 22, 1999, and a copy of the order denying rehearing appears at Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The S.J.C. of 1404 Courthouse, Boston, MA 02108, on an information filed by the Board of Bar Overseers (B.B.O.) by Bar Counsel (B.C.) both of 75 Federal Street, Boston, MA 02110,

entered an order (A.14), suspending petitioner's license to practice law for three (3) years. The underlying petition of B.C. (A.92) was heard by a hearing committee (h.c.) of the B.B.O. which heard only two witnesses, petitioner and a lawyer for a defendant in his client's unrelated case against the Commonwealth of Mass. and her Union. (A.38)

H.c., the sole trier of the facts, found no "fraud or deceit," (A.22) no "conduct involving dishonesty, fraud, deceit or misrepresentation" (A.22), no "knowingly false statement of law or fact" (A.89), no client complaint (A.59), no avarice (A.59), no conduct "prejudicial to the administration of justice" (A.59), no unfitness to practice law (A.59), and h.c. noted that no sanctions by the S.J.C. were imposed in the only case giving rise to B.C.'s complaints, *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991), (A.76) where the S.J.C. expressly ruled there was no frivolous appeal (A.57,59). The lower court in that case also denied GM's and Avis's motion for sanctions (Exhs.113, 100). H.c. also found that petitioner "genuinely believes that his actions were in the best interests of his client." (A.59)

H.c. recommended a suspension of petitioner's license for one year (A.60). An appeal panel of the B.B.O., without hearing any evidence, reversed the finding of h.c. that the petitioner did not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" and recommended a suspension of two (2) years (A.37), and the B.B.O. and a Single Justice of the S.J.C., without hearing any evidence, affirmed a two year suspension without a written opinion other than affirming the report of the appeal panel (A.15). The S.J.C., without hearing any evidence, affirmed except it increased the suspension to three years (A.13). A petition for rehearing (A.101) was denied (A.91).

Petitioner, in his answer to B.C.'s petition, requests for rulings of law, appeals, briefs and oral arguments at each stage of the proceedings, and in his petition for rehearing (A.101), raised the federal questions, due process and Fourteenth Amendment

questions sought to be reviewed here. See, infra. The response thereto by the S.J.C. was its statement "respondent's constitutional claim is without merit." (A.11)

STATEMENT OF FACTS

A near indigent young woman was injured by a *GM* defectively designed, unsafe car and retained an attorney who would take her case to court on a contingent fee basis. Not only was this victim denied justice by the S.J.C. based on its newly created technicalities, but her lawyer was punished and defamed, in a decision which unfairly omits the crucial facts, for prosecuting her case and appealing it to the S.J.C.

The S.J.C. decision, 428 Mass. 656, (A.1) states:

"This bar discipline case concerns the conduct of Louis Kerlinsky (respondent) in representing Kourouvacilis in a damage suit against General Motors Corporation (*GMC*) and Avis Rent-A-Car (Avis) following an automobile fire (A.2)....filed in October 1988 (A.5) ....In or about November, 1985, the Chevrolet automobile that Kourouvacilis purchased from Avis caught fire while she was operating it; the car was destroyed. The respondent agreed to represent Kourouvacilis on a contingent fee basis....wrote to the fire department official responsible for investigating the fire, (Lt. Colburn) and received his report....the suit....alleging that the fire was caused by 'defective wiring'.... Kourouvacilis had told him the Chevrolet was new at the time she purchased it. When he first agreed to represent her, Kourouvacilis made no claims of physical injury....(A.6) The respondent had requested that Kourouvacilis obtain statements from 'auto mechanics regarding the cause of [her] fire.' She left a message for the respondent stating that her mechanic, 'Grez'....would be willing to help. Kourouvacilis drafted a statement for Grzebian stating.....he had been advised by Kourouvacilis that the fire marshall believed the fire had been caused by defective wiring....Grzebian signed [a] statement and

returned it to the respondent on April 13, 1989 (A.8,9)....stating that, based on his experience and training, the fire was caused by defective wiring installed by *GM* (A.7)....Kourouvacilis testified during depositions that Dr. Metz had treated her for migraines after the fire (A.7)....Kourouvacilis's counselor.... Mathison....stated....that Kourouvacilis had a short attention span and poor memory....emotional and academic problems... post-traumatic stress disorder....(A.8)....client claim[ed] that she lost two weeks of wages and her position at 'Adral Co.'....and....lost earning capacity totaled $36,000." (A.9)

The appeal panel decision, *13 Mass. Attorney Discipline Reports, 359* (A.13)states:

"Respondent....pursuing his client's claim on the theory of res ipsa loquitur....filed a complaint against *GM* and Avis raising warranty, negligence, deceit, fraud and c.93A claims (A.18).... Kourouvacilis testified during depositions that she had been treated by Dr. Metz for smoke inhalation after the 1985 fire (A.19)....on September 18, 1989 in correspondence to Kourouvacilis, respondent stated it was 'not helpful to have misinformation in your interrogatory answers and your sworn deposition' and demanded that she produce any documentation that she saw Dr. Metz at any time after October 1985." (A.17).... The respondent....failed to recognize false statements in the client's testimony (A.30)....misstatements of his client." (A.31)

The hearing committee report, (A.)states:

"Lt. Colburn filed a report stating that the source of ignition for the 1985 fire was an 'unspecified short circuit' and that the ignition factor was 'electrical failure.' (A.40,41) On December 17, 1985, the Respondent received a letter from U.S.F.&G. enclosing the appraisal and photographs of the Monte Carlo (A.41)....The Respondent received the Grzebien and Metz depositions...on September 15, 1989 (A.49). The Respondent did not attend either deposition because he was on trial in another

matter (A.47). On September 22, 1989, *GM* and, on September 28, 1989, Avis filed motions for summary judgment and for sanctions (A.50)....The.....Court held a hearing on the defendants' motion to dismiss on October 10, 1989. Because the 'Gerz' statement was not signed under the pains and penalties of perjury, the court stated that it did not satisfy the requirements of Mass. R. Civ. P. 56....On October 13, 1989,....the Respondent visited Grzebien at his shop to have him sign the same statement under oath (A.51)....When Grzebien stated that he was not sure what caused the 1985 fire, the Respondent inserted the word 'probably' before the opinion of cause in order to allay Grzebien's concern and Grzebien signed the statement. The Respondent notarized Grzebien's signature and filed the statement with the court on October 13, 1989 (A.51)."

H.C. ruled that respondent "never had evidence to support damages (A.57).... The *Towne* case....contained averments of Kourouvacilis that the Monte Carlo did not operate well....Her assertions that she lost work because of the 1985 fire....directly contradicted her statements in the *Monson* case that she was able to work....Dr. Metz stated he had not treated [her] since February 1985. These are not minor discrepancies....If the Respondent had corrected the record when he knew or should have known them to be false, his case would have ended. He was, however, obliged to do so and his failure constituted a violation of DR 7-102(B)(1). It follows that in preparing and filing discovery materials and pleadings based on clearly incorrect statements of fact, the Respondent violated DR 7-102(A)(7)." (A.58)

The S.J.C. stated in its decision in *Kourouvacilis v. GM*, 410 Mass. 706, 707, 708, 710, 717 (1991) (A.76)that the "allegations arise out of the plaintiff's purchase of a 1979 Monte Carlo....from Avis in 1979 (A.77)....the official incident report (A.80) issued by the Springfield fire department....indicates that the fire was caused by an 'unspecified short circuit' involving 'electrical failure' igniting 'electrical wire '(A.78)....There is no merit to the plaintiff's argument that, even without expert testimony, she can

prove her case by invoking the doctrine of res ipsa loquitur. The common experience of mankind in no way suggests than an unexplained fire in an automobile six years after its purchase was caused by a defect in the vehicle that had existed from the time of the vehicle's manufacture or sale." (A.87)

Petitioner's brief to the S.J.C. states, with references to the record:

"The Committee erroneously defined 'neglect' as negligence....However, "neglect" involves indifference....Here, the Committee did not find 'indifference'....There was no negligence either....(¶6)

"*Treatises* and *Cornell Drilling Co. v. Ford Motor Co.*, 359 A.2 822 (Pa., 1978), established that the defect was in the design and many cars had this 'congested mass of wiring found beneath the dashboard....literally a fire waiting to happen.' Kirk's Fire Litigation Source Book, sec. 7.03(1) (Exh.161). 'An electrical fire should not occur in the normal electrical system of a vehicle that is protected by safety devices.' Investigation of Motor Vehicle Fires. ¶80 (Exh. 161 (¶7)) And Respondent relied on the *Greco v. Buccuoini*, 283 F.S. 978, 407 F.2d 87 (3rd Cir., 1969) doctrine...'a defective condition....can be established by proving....the product functioned improperly in the absence of abnormal use and secondary causes, and the inference was extended to the time of sale as well as the time of the injury.' *Cassisi v. Maytag Co.*, 396 So.2d 1140 (Fla., 1981); *Bombardi v. Pochel Appl. & T.V.*, 515 P.2d 540 (Wash., 1973). The 'extension...of existing law' and adoption by the S.J.C. of this principle would shift the burden of proof to the party with the most knowledge....Access to justice would be easier.... (¶8)

"Client undertook to obtain the needed evidence (A.54-56, Exh. 135) and had no money to pay for experts (Exh. 122, ¶9). Grzebien....was amply qualified to state his opinion by his training at *GM*'s auto mechanics' institute and work at a Chevrolet dealer

(¶9)....Client had expert testimony of disability from Ms. Mathison (¶15). Dr. Metz's deposition....(and Grzebien's) was taken while defendants knew Respondent was engaged in a jury trial....A motion for protective order was denied (¶13).

"She was entitled to at least $25.00 in damages under c.93A, sec. 9 *Brow v. Stanton*, 12 Mass. App. 922 (1981)....She could recover for her emotional distress under c.93A....she sustained a burned hand and smoke inhalation (¶10). ...As a matter of law, there was adequate evidence of both liability and damages (¶11)....Mathison....opinion, 'I feel that the car fire/explosion was the ultimate trigger for a severe, delayed emotional reaction' was uncontradicted (¶12)....At Dr. Metz's deposition of July 1989 (Exh. 85), he testified he had no contact with client after January 1985....although his EEG was in February 1985....He had no record of the treatment he gave her after the EEG although he testified to it. (Exh. 85, ¶12)....She was able to work in 1985....She lost her job at Admail in 1985 because she was unable to get to work due to no transportation, not because she was disabled. There were no claims in the *Monson* case which contradicted her claims in the *GM* case (¶16). ....She never testified that her car 'operated well.' (¶21) Client had testified at her deposition of April 13, 1985 regarding her auto accident in 1983 and the resulting property damage....Grzebien had inspected the car after the 1983 accident and stated in his affidavit that: 'There was no damage....from this accident which would have contributed in any way to a fire.'" (¶22)

The constitutional questions were raised at each stage of the proceedings and in petitioner's briefs:

"Bar Counsel and the B.B.O. seek to establish new, unreasonable rules:

> A. When a lawyer represents any client, he is obligated to spend his own money on whatever his client's cause may need (¶3).

B. A lawyer must judge the credibility of his client, even in the absence of clearly established perjury (¶4).
C. A lawyer vouches for all of his client's statements (¶5).
D. A lawyer has a right and duty to 'correct the record' ....over his client's objections (¶5)....

"The B.B.O. seeks to punish for 'neglect' of its alleged worthless case (¶14)....

"There can be no violation of DR 7-101(A)(1)(2)(3) without a finding of....intent. But there was no such finding or evidence of Respondent's intent. The Committee expressly found that.... 'Respondent did not have the purpose of failing to seek the lawful objectives of his client, failing to carry out the contract of employment, or prejudicing his client' (A.88)(¶14)....'The purpose of the respondent is irrelevant': Panel (A.24)(¶15)....

"Nor does the petition....include as a ground for discipline any conduct of the respondent in the *Monson* case. Due process rights preclude considering any such ground. (¶17)....

"The committee and panel erroneously found a violation of DR 7-102(A)(2) 'Knowingly advanced a claim that is unwarranted....' The basis....'no evidence of personal injury (A.27) ....However, it contradicted itself and it found 'evidence of an injury'....but ruled it must be supported and uncontradicted (A.29)....an ex post facto unfounded ruling (¶17).

"No attorney has any duty or right to "correct the record" by changing his client's interrogatory answers or deposition statements over his objections. *In re Grievance Com., U.S. v. Long, infra*.... The Committee's sole basis for its finding of a violation of DR 7-102 (B)(1) is 'He was obliged to correct the record.' But there was nothing to correct and there was no obligation to do a useless act. (¶24)....There was no fraud perpetrated by client. 'The defendants did not believe the

information and did not rely on it' (A.59)....No fraud is perpetrated where no fraud is consummated.' A.B.A Informal Opinion #1416 (1979) (¶25).

"Nor does the petition herein charge Respondent with any dishonesty in procuring affidavits (¶19)....The panel....ruled on claims which were not made in the petition, all in violation of due process. *In re Ruffalo*, infra (¶26).

"Without hearing any evidence, the Panel in violation of S.J.C. Rule 4:01, §8(3) and due process *Goldberg v. Kelly*, 397 U.S. 254, 269, 271 (1970), concluded that Respondent's testimony was incredible and he knew 'his client's statements were false'.... There was no 'explicit analysis of credibility' which established knowledge as required by the *Goldberg*....cases (¶31)....While [h.c.] called....statements 'false' nowhere did it, the panel, or the petition state that 'false' meant intentional, knowing, misstatement intended to deceive. (¶30) ....The Committee also failed to comply with the 'Order of Appeal Panel'....The Panel asked whether Respondent's 'conduct....was done knowingly.' The Committee's only response was that the violation which it found, namely failing 'to correct the record' and preparing and filing statements was done knowingly....This is not a finding that Respondent knew his client made knowingly false statements with intent to deceive...." (¶31, 32)

"The Committee and Panel did not hear client testify and had no sound basis for their conclusions. They were not based on 'clear and convincing evidence' as required by the U.S. Constitution. *Santosky v. Kramer*, infra. See Requests for Rulings ¶3-7, (¶33)....The Panel heard no evidence (A.14). It violated the due process right to a hearing (¶41)....The Panel's conclusions rest on its determination of credibility, are arbitrary and capricious, are not supported by the evidence and subsidiary findings, and go beyond the scope of the petition (A.92,98), in violation of due process (¶43)....

"No attorney should be punished on the basis of ex post facto rulings without being given fair notice thereof through prior decisions of the S.J.C. or the express language of the Code. See Requests 4,5. *In re Ruffalo*, 390 U.S. 544, 546 (1968), *Marks v. U.S.*, 430 U.S. 188, 191 (1977), *U.S. v. Goodwin*, 457 U.S. 368, 375 (1988). Such punishment violates the rule of law and due process. *Bouie v. Columbia*, 378 U.S. 347, 353, 359 (1963), *Ex Parte Garland, 4 Wall*, 333, 347 (1866)...(¶44)....Here, Bar Counsel and the B.B.O. again seek to punish respondent on the basis of new, self-promulgated rules and interpretations. *Opinion of M.B.A. Com. of Professional Ethics*, 1989-1, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048, 1051 (1991) (¶45).

"Nor should any attorney be punished except on 'clear and convincing evidence.' See Requests, ¶6-7. S.J.C. Rule 4:01, §8(3) is unconstitutional. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982). This is the standard applied in less important instances. See *Ryan v. Ryan*, 419 Mass. 86, 642 N.E.2d 1028, 1033 (1994); *Schad v. Arizona*, 501 U.S. 625, 627, 111 S.Ct. 2491, 2500 (1991) (rationality is an essential component of fundamental fairness). Fraud on the court must be shown by 'clear and convincing evidence.' *Rockdale Mgt. Co. v. Shawmut Bank*, 418 Mass. 596, 598, 600, 638 N.E.2d 29, 32 (1994). Forty states, the federal courts, and the A.B.A.'s Model Rules for Lawyer Disciplinary Enforcement 18(C) (1989) require this standard. A.B.A.-B.N.A. Lawyer's Manual on Professional Conduct, §101:2112. *In re Walton*, 676 P.2d 1078 (Alaska, 1983); *In re Medrano*, 956 F.2d 101, 102 (5th Cir., 1992); *In Matter of Thalheim*, 853 F.2d 383 (5th Cir., 1984); *Ex parte Wall*, 107 U.S. 265, 2 S.Ct. 569 (1883). Federal due process requires it. See *Santosky*, ¶1396: As 'the individual interests at stake are both particularly important and more substantial than mere loss of money....this level of certainty (is) necessary to preserve fundamental fairness in a variety of government initiated proceedings that threaten the individual involved with a significant deprivation of liberty or stigma.' (¶45,46)

"The right to practice law is a 'fundamental right.' *Supreme Court of N.H. v. Piper*, 470 U.S. 278 (1985); *Matter of Jadd*, 391 Mass. 227, 461 N.E.2d 760, 766 (1984). 'The right to practice [a] profession....is both liberty and property (for) due process (purposes).' *Haran v. Bd. Of Registry of Medicine*, 398 Mass. 571, 500 N.E.2d 268, 272 (1986). 'Proof beyond a reasonable doubt is required when a person (1) receives a stigma at least as great as that flowing from a criminal conviction, and (2) faces a potential loss of liberty." *Guardianship of Roe*, 383 Mass. 415, 420, 421 N.E.2d 40, 45 (1981). There is both stigma and loss of liberty involved here. (¶46)

"The use of a preponderance of evidence standard here violates due process and the *U.S. Const., 14th Amendment. In re Medrano, supra; In Matter of Thalheim, supra; Santosky, supra. In re Fisher*, 179 F.2d 361, 369 (7th Cir., 1950); *In re Ryder*, 263 F.S. 360, 361, affd. 381 F.2d 713 (4th Cir., 1967); *Netterville v. Miss. State Bar*, 397 So.2d 878 (Miss., 1981). It excludes 'a person from the practice of an occupation in a manner or for reasons that contravene the due process or equal protection clause of the *14th Amendment*.' *Marmer v. Bd. of Reg. Of Chiropractors*, 358 Mass. 18, 260 N.E.2d 672, 675 (1970).

"Equal protection requires the same protection for lawyers and Judges. Mass. Com. on Judicial Conduct, Rule 10 requires 'clear and convincing evidence.' See *Statewide Grievance Comm. V. Presnick*, 575 A.2d, 210, 215 (Conn., 1990)(¶47).

"'[A] principal reason for any constitutionally mandated departure from the preponderance standard has been the adoption of a more exacting burden of proof by a majority of jurisdictions. In each of the cases in which we have held that a standard of proof prescribed by a state legislature was unconstitutional, our judgment was consistent with the standard imposed by most jurisdictions.' *Rivera v. Minnich*, 483 U.S. 574, 578 (1987). A substantial majority of jurisdictions have adopted the 'clear and

convincing evidence' standard. A searching analysis of this issue is required. *Addington v. Texas*, 441 U.S. 418 (1979).

"Stigma" and loss of a 'profession' by a 'quasi-criminal' proceeding requires a standard of proof higher than a preponderance especially as the 'risk of error,' particularly in finding intent and actual knowledge, is high. 'A stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the state.' *Santosky*, ¶767. The Committee and the Panel's findings here were not made with the proper standard of burden of proof." (¶48)

In his reply brief, petitioner stated:

"B.C. and B.B.O. seek to punish based on ex post facto rulings: 'When the Respondent entered into a contingent fee agreement....he obliged himself to take all reasonable steps permitted by law....to secure her rights.' (B.C.¶37). Here, the client agreed to do what was needed to obtain the evidence. ¶6....

"Punishing any attorney for 'violations under DR 7-101(A) for their intentional conduct even when that conduct was not undertaken for the specific purpose....to inflict harm or damage' (B.C. ¶43,44), is a gross miscarriage of justice and misinterpretation of DR 7-101(A), ¶7....

"The Respondent [did not] file affidavits, interrogatory answers, and other pleadings which contained statements the Respondent knew were 'false.' (¶8)....There is no showing that Respondent knew of any knowingly false statements of the client. (¶9)....B.C. fails to state the standard for determining this 'actual knowledge.' The standard is set forth in *U.S. v. Long*, 857 F.2d 436, 445 (8th Cir., 1988)....'Counsel must remember that they are not triers' of fact, but advocates. In most cases a client's credibility will be a question for the jury. (¶10)....An attorney who acts on a belief of possible client perjury takes on the role of fact finder, a role which perverts the structure of our adversary

system. A lawyer who judges a client's truthfulness does so without the many safeguards inherent in our adversary system. (¶12)....We do not believe that the Code's drafters intended to throw the court system in such a morass. (¶13)....The 8th Circuit insists upon a direct client admission of perjury to establish 'knowing' or 'actual knowledge.' (¶15)....B.C. is aware there is a difference between what is 'false' and what is 'perjurious or fraudulent' and that what is 'false' in the sense used by the B.B.O. and B.C. is not perjurious or fraudulent. (¶21)

"Panel made findings of fact without hearing any evidence in violation of due process and Massachusetts law. See *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *Salem v. M.C.A.D.*, 404 Mass. 170 (1989); *Wolff v. McDonnell*, 418 U.S. 539 (1974)(¶30)....B.B.O. and B.C. proceedings are government initiated proceedings involving a fundamental liberty interest, the right to practice law. B.C. concedes (B.C.¶74) that *Santosky v. Kramer*....is applicable to the Court's procedure for terminating the right to practice law....(¶31,32)....Punishing and stigmatizing attorneys, preventing them from representing their clients zealously and fearlessly, on the base of anything less than clear and convincing evidence, does not serve the interests of the public....(¶32)....There is no ethical violation....without clear, fair prior warning, knowledge of the rules and conscious, knowing, subjective intent to violate. *Gentile v. State Bar....In re Ruffalo*....Not only due process, but 'fundamental fairness' requires it." (¶34)

In his petition for rehearing, (A.101) he stated:

"H.C. found....no 'intentional wrongdoing' and thereby found there was no knowing wrongdoing. It and the Panel also expressly found that he did not violate DR 7-102(5), did not 'knowingly make a false statement of law or fact'....The decision states 'In interrogatories (sic) and an affidavit prepared by the respondent he falsely represented that expert witnesses were available to testify in support of Kourouvacilis' claim....and knew

that none would'....In fact, he 'knew' and believed that they would testify in support of her claims based on their written statements....

"Mathison never stated she could not provide 'the nexus between the fire and....emotional problem because she was not qualified to identify the cause of the post-traumatic stress syndrome.' She testified only that she was not qualified to state its physiology. (A.103)

"Grez did not 'know anything about the Chevrolet or what could cause the fire.' (A.) He knows what 'knows' means. He clearly and honestly had an opinion based on provable hypothetical facts. (A.103,104)

"The decision does not state what standard of proof is required to establish 'knowledge.' Nor did any rule or law give notice when the time to correct inconsistencies expires....Respondent had ample time left to correct inconsistencies when the *GM* case ended by summary judgment....(A.106)

"Nor is there any finding of fact by the h.c. or panel or any evidence that respondent 'fraudulently procured affidavits'....The petition does not charge fraudulently procuring affidavits. It's a violation of due process to punish without giving prior notice of an alleged violation, *In re Ruffalo* (A-105)....

"Nor is there any prior law which required respondent to correct statements of his client which he knew were false, and the decision cites none. In 1989, the *Mass. Bar Assoc. Committee on Professional Ethics* wrote #89-1, 'In our view the intimations from the S.J.C. have been so ambiguous, the controversy over the proper interpretation of the rule has been so great....that no lawyer should be disciplined for adopting any of these positions (including discretionary disclosure).' Punishment on the basis of new interpretations of the Rules violates due process. *Gentile*....

"The decision errs by concluding that the 'panel rightfully corrected errors it concluded the hearing committee had made in applying its findings'....Even if there were errors made by the h.c., it expressly found no violation of Canon One, that there was no fraud or deceit, no wrongful intent, and no conduct involving dishonestly, fraud or deceit in the respondent's conduct....Even if there were inconsistencies in h.c. findings, the panel cannot lawfully choose which set of inconsistent facts is true. The panel violated due process by making findings of fact without hearing any evidence, and the decision violated due process by affirming. *Wolff v. McDonnell*, *Goldberg v. Kelly*. Neither h.c. nor the panel heard any testimony from the client. (A.106,107)....

"The decision adopts an erroneous definition of neglect.... unclearly equating it with negligence rather than indifference (A.107)....Moreover, the panel found 'the facts did not support the claim to begin with regardless of prompt and adequate preparation'....The S.J.C. is affirming a new rule in violation of due process, a lawyer should be punished for neglecting a worthless case, for failing to search for non-existent evidence. (A.108)....

"Nor does the evidence warrant a finding of violation of DR 7-101(A)....'A lawyer shall not intentionally....damage his client.' There was no evidence of such intent....'The committee finds the respondent did not have [that] purpose'....The panel ruled, 'The purpose of....respondent is irrelevant'....The decision acknowledges that the finding was 'the respondent's conduct and therefore his violation of DR 7-101(A)(1)(2)(3) was intentional.' That the conduct was intentional does not establish that there was an intent to damage. The S.J.C. has clearly erred. This new interpretation of the Rule violates due process, *Gentile*, *supra*, as it imposes punishment without notice. This new interpretation, that a lawyer acts unethically by harming an alleged frivolous, worthless case is irrational....(A.109)....

"There was no evidence to support the panel's and h.c.'s

finding that respondent violated DR 7-102(A)(2), 'knowingly advanced an unwarranted claim' solely because there was no evidence of damages....There was clearly evidence to support damages and the panel so acknowledged,....Allowance of a motion for summary judgment or even losing a case does not establish 'an unwarranted claim.'" (A.109)....

The petition for rehearing cites numerous statements in the S.J.C. decision which misstate the record in this case. (A.110,111)

"The decision that 'Bar discipline charges need only be proven by the preponderance of the evidence' (A.9, n.10) relies on *Matter of Mayberry*, 295 Mass. 155, 167 (1936) and is unconstitutional and in violation of due process; *Mayberry*'s reason for rejecting the 'clear and convincing' standard is 'such terms are too vague to serve generally as a practical guide in the trial of cases.' This 1936 case has been superseded in Massachusetts by such cases as *Ryan v. Ryan*, 419 Mass. 86 (1994)....where the 'clear and convincing' standard was used. In addition this standard is now mandated by the U.S. Constitution's due process cases since 1982. *Santosky* (A.113,114)....

"Punishment based on new interpretation of rules and new ex post facto rules as aforesaid, violate respondent's due process rights." *Gentile, supra....In Ruffalo* (A.114)....

"The increase of punishment because of a lack of 'appreciation that his behavior....violated the Canons' is akin to increasing punishment for failing to plead guilty and violates due process rights." (A.116)

REASONS FOR ALLOWANCE OF THE WRIT

A. Protection of "counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate," *Sacher v. U.S.*, 343 U.S. 1,13 (1952), and from

violations of their *Fourteenth Amendment* rights is essential for the administrating of justice and access to justice and the courts. "Considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment against appellant....Nothing that this record shows....permits an inference....which would constitutionally authorize the application of the Disciplinary Rules to appellant's activity." *In re Primus*, 436 U.S. 433, 434, 436 (1978).

"The State is not entitled to interfere with access" to courts. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643 (1983) "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Ala.*, 387 U.S. 45, 68-69 (1932)

"Some commentators have suggested that vague disciplinary rules have been used as a tool for singling out unorthodox and unpopular attorneys for sanction....When an attorney's constitutional rights have been violated, we have not hesitated in the past to reverse disciplinary sanctions that were even less severe than a public reprimand." *Zauderer*, *supra*, 667, n.10, 669.

"The S.J.C. decision not only besmirches an old lawyer's reputation and defames him, but will instruct all lawyers....in....what should....be done...in order to escape....Bar Counsel, independent counsel, and the Board of Bar Overseers, the grand jury-like volunteers to punish the weak." (A.110)

"A bar discipline system which can punish on the basis of ex post facto unconstitutional rulings enforced by the S.J.C. will destroy the bar and the legal system. Lawyers who are subject to arbitrary and capricious punishment and lawlessness, violations of the rule of law, will leave....to the detriment of everyone." (A.102)

"The touchstone of due process is protection of the individual against arbitrary action of the government." *Wolfe, supra*, 558.

"Operating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts." *Shapiro v. Kentucky Bar Assoc.*, 486 U.S. 466, 489 (1988) (O'Connor, J., dissenting).

I. Instruction by the U.S. Supreme Court, that due process prohibits punishment on the basis of new, unprecedented ex post facto, irrational interpretations of vague rules applied retroactively without "fair warning," is needed where a decision of the highest court of a State afflicting such punishment conflicts with decisions of the United States Supreme Court. Lawyers who are subject to such punishment will not be "fearless, vigorous, and effective....advocate(s)." *Sacher, supra*.

I.a. The Due Process clause was violated when the petitioner was punished by the S.J.C. for violating....

1. Disciplinary Rule DR 7-101(A) ("A lawyer shall not intentionally....damage his client"). H.c., the sole trier of facts, found petitioner "did not have [that] purpose." (A.88) The appeal panel found "the purpose of [petitioner] is irrelevant." (A.24) The S.J.C. affirmed stating "the [petitioner's] conduct, and therefore his violation....was intentional." (A.4,5) "That the conduct was intentional does not establish that there was an intent to damage. The S.J.C. has clearly erred. This new interpretation of the rule violates due process, *Gentile, supra*, as it imposes punishment without notice. This new interpretation, that a lawyer acts unethically by harming an alleged frivolous, worthless case is irrational...." (A.109) It is irrational for the S.J.C. to punish petitioner for violating a rule forbidding a lawyer from intentionally harming his client when there was no such evidence or finding and the finding was that there was no such intent. It is irrational to punish petitioner for harming his client's

case while holding that her case was worthless and frivolous.

The "concept of due process....demands....fundamental fairness....and....the rationality that is an essential component of that fairness." *Schad v. Arizona*, 501 U.S. 637, 640 (1991)

"As interpreted, the Rule is void for vagueness....[as it fails to provide] fair notice to those to whom it is directed....and [creates the possibility] of discriminatory enforcement." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048, 1051 (1991)

"Neither the published rules, state authorities, nor governing precedents put [petitioner] on notice....A regulation that 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The Fourteenth Amendment's Due Process Clause insists that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)....The State instead has punished [petitioner] for violating requirements that did not exist prior to his disciplinary proceeding....'Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him' due process guarantees must scrupulously be observed.' *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)." *Zauderer*, (Brennan, J.) *supra*, 665-669.

"Retroactivity is generally disfavored in the law." *Eastern Enterprisess v. Apfel*, 118 S.Ct. 2131, 2151 (1998). "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place....has long been a solid foundation of American law." *Kaiser Aluminum v. Bonjorni*, 494 U.S. 827, 855 (1990)

2. The Due Process clause was violated when petitioner was

punished for violating DR 7-102(A)(2) (knowingly "advance a claim that is unwarranted") because the evidence of damages was "unsupported and highly contradictory." (A.29) There was no notice that evidence of damages must be supported and not contradicted. It is irrational to interpret this rule to hold that evidence must be uncontradicted. "There was evidence of damages, smoke inhalation, a burned hand, a severe delayed emotional reaction, all of which client swore to in her interrogatory answers and deposition....(G.L. of Mass.) c.93A also provides damages for breach of warranty without evidence of damages. There was clearly evidence to support damages and the panel so acknowledged (A.29) [Petitioner] did not prosecute a 'frivolous claim.'" (A.11)

3. The Due Process clause was violated when petitioner was punished by the S.J.C. for violating DR 6-101(A)(3) ("neglect") because he failed to search for evidence which allegedly did not exist, where the S.J.C. affirmed the appeal panel's erroneous finding: "The facts did not support the claim to begin with regardless of prompt and adequate preparation." (A.29) The S.J.C. affirmed "a new rule in violation of due process, a lawyer should be punished for neglecting a (frivolous) worthless case, for failing to search for non-existent evidence." (A.97) However, there was ample evidence of liability and damages, *supra 3-7*, and the S.J.C. misinterpreted "neglect" equating it with negligence rather than "indifference." *A.B.A. Informal Opinion* #1273 (1973) There was no indifference either. H.c. found, "Respondent....
genuinely believes that his actions were in the best interests of his client." (A.59)

4. Due process was also violated when petitioner was punished for violating DR 7-102(B)(1), (Failure to "reveal" a client's "perpetrated fraud"). H.c. found no fraud was perpetrated and no revealing was needed as: "the defendants did not believe the information and did not rely on it." (A.59) The S.J.C. made new rules, a lawyer may be punished for not revealing to his

adversaries what they already knew and for not revealing a client's "perpetrated fraud" even when there was no "perpetrated fraud."

5. Due process was violated by punishing petitioner for violating DR 7-102(A)(7), assisting "his client in conduct that he knew to be....fraudulent." The S.J.C. found a violation thereof though there was no h.c. finding of client fraud; h.c. found he did not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation" (A.59); there was no evidence that petitioner had actual knowledge of any false statement by his client; the Massachusetts Bar Association had found that, because of vagueness and lack of precedent, "no lawyer should be disciplined" under this rule regarding a client's perjury, (*Opinion of the M.B.A. Committee on Professional Ethics*, 1989-1); "no authority had interpreted 'assist'" in that rule, *Wolfram, Modern Legal Ethics* (694); the S.J.C. found that petitioner had "assisted" his client by filing her "affidavits and interrogatory answers" (A.11), and not counseling "her to correct her misstatements" (A.7, but see A.49); and the S.J.C. found that petitioner "knew" of his client's fraud only because he should have judged her credibility and state of mind, even though he was unaware and lacked "appreciation that his conduct was improper." (A.13) There was also no "explicit analysis of credibility" of the petitioner or his client as required by the *Goldberg* case, *supra*.

This was a new, unprecedented interpretation of the rule and contrary to existing law which did not require a lawyer to judge his client's credibility and vouch for his client's statements. See *Com. v. Sullivan*, 410 Mass. 521, 527 (1991); *U.S. ex rel Wilcox v. Johnson*, 555 F.2d 115, 122 (2nd Cir., 1977) ("It is the role of the judge or jury to determine the facts, not that of the attorney."); *Mass. Rules of Professional Conduct*, §3.3.(1) ("An advocate does not vouch for the evidence submitted in a case."); *In re Grievance Com. of U.S. Dist. Ct. of Conn.*, 847 F.2d 57, 62 (2nd Cir., 1988) ("actual knowledge" requires that "the client acknowledge to the attorney that he has perpetrated a fraud.");

U.S. v. Long, 857 F.2d 436, 445, 447 (8th Cir., 1988)(direct client admission of perjury required to establish "knowing," "a clear expression of intent."); *Restatement of Torts (2nd)* §674, com. d ("an attorney is not required or expected to prejudge his client's claim.")

Lawyers will be reluctant to represent clients if they are subject to punishment for their clients' false statements and for violation of rules without fair notice.

II. The S.J.C. violated petitioner's due process right to a hearing when it reversed the findings of the sole trier of facts, that he had not "engaged in conduct involving dishonesty, fraud, deceit or misrepresentation," he was not "unfit to practice law," and did not "engage in any other conduct that adversely reflects on his fitness to practice law" in violation of DR 1-102(A)(4) (5)(6), where the S.J.C. heard no evidence, relied on an appeal panel that heard no evidence, and there was no such evidence. (A.14) "Under [Mass.] procedure, the court's role was....limited to a record review of the Board's....findings to determine whether they were 'against the weight of the evidence' or made in violation of legal and procedural guarantees....To hold that this sort of procedure constituted a meaningful 'chance to be heard in a trial of the issues,' *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) is to make a mockery of the due process of law that is guaranteed every citizen accused of wrongdoing." *Zauderer*, *supra*, 672, 673.

"The decision also errs by concluding that the 'panel rightfully corrected errors it concluded the hearing committee had made in applying its findings.' (A.10) Even if there were errors made by h.c., it expressly found no violation of Canon One, that there was no "fraud or deceit," (A.59) no wrongful intent and no conduct involving dishonestly, fraud or deceit in the respondent's conduct." (A.95) "It found that Respondent had no intent to defraud or deceive. 'He did not believe the defendants would take the false information at face value and rely to their detriment

upon it. The Defendants did not believe the information and did not rely to their detriment on it.' (A.59)

"Even if there were inconsistencies in h.c. findings, the panel cannot lawfully choose which set of inconsistent facts is true. The panel violated due process by making findings of fact without hearing any evidence and the decision violates due process by affirming. *Wolff v. McDonnell*, 418 U.S. 539, 564, 566 (1974), *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). (A.106,107)

"Particularly where credibility and veracity are at issue....written submissions are a wholly unsatisfactory basis for decisions." *Goldberg*, ¶269.

The panel's findings regarding petitioner's knowledge and intent were not supported by the evidence, h.c.'s findings and adequate explanations. There was no sound basis for the panel's conclusion that petitioner "knew his client made false statements." It would be capricious to punish a lawyer for a client's false statements that are not relied on, and not intentionally untrue.

III. The S.J.C. denied petitioner due process by ruling that its Rule 4:01, §8(3) which "allows an attorney to be punished on proof by a preponderance of the evidence as opposed to 'clear and convincing evidence'" is not "unconstitutional" (A.11, n.10) and punishing him under its standard of proof. For the reasons stated in petitioner's briefs, *supra*, ¶9-13, the S.J.C. decision conflicts with *Santosky v. Kramer* and *Netterville v. Miss. State Bar*, *supra*.

Steadman v. S.E.C., 450 U.S. 91, 97 n.15, 104 (1981) was decided a year before *Santosky* and did not raise "countervailing constitutional considerations." "Petitioner makes no claim that the Federal Constitution requires application of a clear and convincing evidence standard." n.15. It left the question open. *Santosky* supersedes it and is applicable here especially as fearless

advocacy is so essential for access to justice. Fearless advocacy is chilled when findings of fact, regarding a lawyer's state of mind intent and knowledge which threaten "the destruction of his professional life, his character, and his livelihood." *In re Fisher*, 179 F.2d 361, 370 (7th Cir., 1950), are made under a standard of proof less than "clear and convincing evidence."

IV. S.J.C. Rule 4:01 denies equal protection by discriminating against lawyers by allowing disciplining of them on proof by a preponderance of the evidence while its Rule 10 on *Judicial Conduct* allows disciplining of judges only on proof by "clear and convincing evidence." This conflicts with *Statewide Grievance Comm'n v. Presnick*, 575 A.2d 210, 215 (Conn., 1990) ("We discern no good reason why this same standard should not apply to disciplinary proceedings involving lawyers.") and *Cruzan v. Dir. of Miss. Dept of Health*, 497 U.S. 261, 300 (1990): ("Equal protection clause....requires the democratic majority [the rule makers] to accept for themselves and their loved ones what they impose on you and me.") Here, the equal protection clause requires that the judges accept for themselves the burden of proof they impose on lawyers and vice versa. Failure to treat like cases alike violates equal protection.

"All people charged with crime must.... 'stand on an equality before the bar of justice in every American court.' *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) The same applies to a charge of unethical professional conduct. "The Equal Protection Clause....imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).

V. The S.J.C. violated due process by punishing petitioner for having "fraudulently procured affidavits" (A.8-10) where he was not charged therewith. It is a violation of due process to punish without giving prior notice of an alleged violation. *In re Ruffalo*, 390 U.S. 544, 555 (1968)

"'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence.' *In re Oliver*, 333 U.S. 257, 263 (1948). Under the Due Process clause, 'reasonable notice' must include disclosure of 'the specific issues the party must meet,' *In re Gault*, 387 U.S. 1, 33-34 (1967)....and appraisal of 'the factual material on which the agency relies for decision so that he may rebut it,' *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4 (1974). These guarantees apply fully to attorney disciplinary proceedings....Where there is an 'absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges' so that the attorney is not given a meaningful opportunity to present evidence in his defense, the proceedings violate due process. *In re Ruffalo*, 390 U.S. at 552." *Zauderer*, *supra*, ¶671, 672.

Not only did the petition not charge fraudulent procuring of affidavits, (A.) but h.c. did not so find and there was no evidence thereof. Punishment for wrongdoing when there is no evidence thereof violates due process. Nor can there be "fraudulently procured affidavits" without a "false statement." H.c., the panel and the S.J.C. found that petitioner made no false statements. He did not violate DR 7-102(A)(5). It is irrational and illogical to punish him for fraudulently procured affidavits. There can be no fraudulent procurement without a false statement. Due process requires rationality.

VI. The S.J.C. violated due process by enhancing petitioner's punishment because he "lacks any appreciation that his behavior was improper." (A.11) This "is akin to increasing punishment for failing to plead guilty and violates due process rights." (A.105) "Penalizing those who choose to exercise constitutional rights would be patently unconstitutional." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) To penalize a lawyer because he is unaware and has no "conscious belief"...."that his behavior was improper," and therefore did not "know" it, *Restatement of*

Agency 2d, §9, com. c, and did not "know" his client made any false statements, let alone fraudulent ones, is "patently unconstitutional." Lack of appreciation that behavior is improper imports a lack of awareness, knowledge and intent to behave improperly. It, therefore, rationally warrants less and not greater punishment.

Enhancement of punishment of an attorney because of his client's statements chills advocacy and is unconstitutional unless the attorney's conduct is "willful," intentionally "designed" to defraud. *U.S. v. Dunnigan*, 507 U.S. 87, 93, 94 (1993) Here, h.c. expressly found that there was no "fraud or deceit" and no "conduct involving dishonesty, fraud, deceit or misrepresentation" in petitioner's conduct.

Lawyers who act in "good faith" and without "wrongful intent" should not be punished. "'Lawyers must have the freedom to make innocent....mistakes without fear of losing the ability to practice....Without a scienter requirement, lawyers would slant their advice out of fear....Improper professional conduct could not occur....until a lawyer becomes aware that his client is engaged in substantial and continuing failure to satisfy....laws....lawyers who act in good faith cannot be sanctioned." *Checkosky v. S.E.C.*, 23 F.3d 461, 484, 485 (D.C. Cir., 1994).

VII. As this is not an isolated case of a violation of the U.S. Constitution by the Mass. S.J.C., this petition for certiorari should be granted.

In the *Matter of Kerlinsky*, 406 Mass. 67, 73 cert. den., 498 U.S. 1067, petitioner was disciplined for charging an additional fee for an appeal, where the S.J.C. ruled without any notice or Massachusetts precedent, and contrary to practically every decision elsewhere, that a contingent fee agreement does not terminate after a trial and applies to an appeal. See *Slepin v. Beck*, 145 N.Y.S. 530 (1914), *Vitale v. LeCour*, 459 N.Y.S.2d

881 (1983).

In the Matter of Fordham, 423 Mass. 481 (1996) the S.J.C. rejected the claim that discipline there denied that petitioner of due process because, when he charged an agreed fee, he lacked notice that his conduct was subject to discipline. The S.J.C. imposed discipline "because the amount of time....spent....was clearly excessive despite his good faith and diligence."

In the Matter of Lake, 428 Mass. 440 (1998) the S.J.C. rejected the claim that discipline there denied that petitioner due process because, when she entered into a real estate broker's agreement with her client, she had no notice that she was required to reveal to her client that she had an adverse interest to her because she was also her lawyer. The S.J.C. imposed discipline because, despite her good faith and diligence, the lawyer did not inform her client she had an interest in obtaining a fee under her brokerage agreement.

In Irish American Gay, Lesbian and Bi-Sexual Group of Boston v. Boston, 418 Mass. 238 (1994) the S.J.C. ordered GLIB into the Veteran's Council's St. Patrick's Day parades, which the veterans canceled, and imposed fines on the veterans.

Judge Nolan dissented and wrote, "Today a majority of this court upholds, and thereby endorses, a trial judge's flagrant violation of the free speech rights of citizens of this Commonwealth....One must strain to recall or even to imagine such an obvious violation of the revered right to free speech."

The U.S. Supreme Court reversed and held "the Massachusetts law has been applied in a peculiar way....the State....may not compel affirmance of a belief with which the speaker disagrees", that the parade was the veterans' protected speech, and that the S.J.C. had "violated the fundamental rule of protection under the First Amendment." *Hurley v. Irish American Gay Group of Boston*, 515 U.S. 557, 572 (1995) It also changed certain facts

found by the Massachusetts courts because they were erroneous.

See also the *Boston Globe* article of December 20, 1998, ¶C7: "*In Defense of the Supreme Judicial Court*" by Rudolph Kass, Associate Justice of the Massachusetts Appeals Court: "Among the more peculiar notions published in the press of late is that the Supreme Judicial Court of Massachusetts has lapsed from grandeur and needs refurbishing....Least of all may it be taken as symptomatic of something locally amiss that the U.S. Supreme Court reversed the Massachusetts Court in the South Boston St. Patrick Day's Parade case....Among a respectable portion of the Massachusetts bench and bar, the state Supreme Judicial Court had it right and the U.S. Supreme Court got it wrong and reached its result by changing the facts found by the Massachusetts trial judge." 27 Mass. Law Weekly, 1387, 1407 (March 1, 1999)

Where the judge acknowledged that the press has published articles stating that there is "something locally amiss" with the Supreme Judicial Court of Massachusetts, and that a "respectable portion of the Massachusetts bench" believes that the "U.S. Supreme Court got it wrong," there is a great need for granting this petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts.

The threat of arbitrary attorney disciplinary punishment, with its devastating effect on an attorney's reputation and livelihood, is a danger to all attorneys. Its fear interferes with the "fearless, vigorous and effective performance of every duty pertaining to the office of the advocate." Unlike questions involving lawyer advertising, it affects all lawyers and all aspects of the practice of law and the administration of and access to justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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